NO. 90-1633

Supreme Court, U.S.
FILED
APR 15 1991
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

MELVIN D. PHILLIPS,

Petitioner,

vs.

MARTINEZ PLANNING DEPT., ET AL.
CITY OF MARTINEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
(Division Five)

PETITION FOR WRIT OF CERTIORARI

Melvin D. Phillips
In Propria Persona
P.O. Box 1979
Martinez, CA 94553
(415) 372-3394

QUESTIONS FOR REVIEW

The questions presented for review by this court, on the facts stated herein, are as follows:

1. Is this Court required to use its power of supervision, where a State Court denies a Pro Per litigant all access to judicial review through an accepted practice of summary dismissal, by citing ambiguous procedural requirements?

2. Can a City deprive the owner of real property all uses to his property, without compensation, by adopting restrictive procedures that are contrary to State and Federal Laws?

3. May the State of California arbitrarily deprive a citizen of the United States his equal protection of the Constitution of the United States, or his right of due process and equal protection under the Constitution by surpressing Petitioner's property rights and his rights to access of the courts because he is a Pro Per litigant?

PARTIES

Petitioner: Melvin D. Phillips
(In Propria Persona)
P.O. Box 1979
Martinez, CA 94553
(415) 372-3394

Respondent: Martinez Planning Department,
Martinez Planning Commission,
Martinez City Attorney, and
Martinez City Council

Represented by: Jeffrey A. Walter
Walter & Pistole
2455 Bennett Valley Road
Suite 302B
Santa Rosa, CA 95404
(707) 523-0732

Superior Court: Judge Patsey, Marchiano, Dolgin
Case No. C88-02862
County Clerk, J.R. Olsson
725 Court Street
P.O. Box 911
Martinez, CA 94553
(415) 646-2950

Appellate Court: Justices Low, P.J. King, Haning
Case No. A048596
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350 McAllister Street
4th Floor
San Francisco, CA 94102
(415) 557-1896

Supreme Court: Chief Justice Lucas
Case No. A048596
Court Clerk, Robert F. Wandruff
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TABLE OF AUTHORITIES

California Code of Civil Procedure §1094.6

43 Cal Jur 3d Limitations of Actions, pgs 225 & 227, (CT-P55-L8/14) §161

Government Code §65913.5

California Code of Civil Procedure §1094.5

Government Code §65589.6

Government Code §65589.5

Evidence Code §669.5

Government Code §65944

Government Code §65921

Government Code §65852

U.S. Const. Amend. I

U.S. Const. Amend V.

U.S. Const. Amend. XIV Sec. I

TABLE OF COURT REPORTS

(Not Submitted)

Clerk's Transcript on Appeal from the Statement of Decision entered on January 24, 1990 (Vol I & II)

Reporter's Transcript of Proceedings, January 2, 1990

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MELVIN D. PHILLIPS,

Petitioner,

vs.

MARTINEZ PLANNING DEPT., ET AL.
CITY OF MARTINEZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT
(Division Five)

JURISDICTION

The Judgment to be reviewed is the result of a Tentative Decision by Judge Patsey on January 5, 1990, which resulted in a Statement of Decision filed on January 22, 1990, resulting in a Judgment that was signed and filed on September 20, 1990. The Judgment was entered on September 26, 1990. The Appellate Court filed it's report on November 9, 1990. The State Supreme Court denied the petition for review on January 16, 1991.

This court has jurisdiction of this case, pursuant to Rule 17 and section 1257 of Title 28 of the United States Code.

The California State Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this court.

In addition, a State policy is being drawn into question as being repugnant to the U.S. Constitution.

Time limit for seeking review of administrative determinations; Preparation of record; Application to local agency

(c) The complete record of the proceedings shall e prepared by the local agency... and shall be delivered to the petitioner within 90 days after he has filed a written request therefor...

California Code of Civil Procedure §1094.6.

§161. Fraud; misrepresentation; concealment

If, by fraudulent acts or misrepresentations, the defendant induced the plaintiff to delay bringing suit on a known cause of action until after expiration of the limitation period, the defendant is estopped to plead that the action is barred..., of the statute of limitations, and the statute does not become operative until the aggrieved party discovers or should discover the facts. This is true whether the action be legal or equitable and though no relief on the grounds of fraud is sought.

43 Cal Jur 3d LIMITATIONS OF ACTIONS pgs. 225 & 227 (CT-P55-L8/14)

Alternative Writ of Mandate When and by what court issued.

....., to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty

resulting from an office, trust or station;....(CT-P50)

California Code of Civil Procedure §1085

Protest of imposition of exactions; requirements; retaliation prohibited; time for filing; effect

(a) Any party may protest the establishment of the imposition of any fees, dedications, reservations, or other exactions imposed...(CT-P53)

Goverment Code §65913.5

(Inquiry into validity of administrative order or decision.)

(b) ....Abuse of discretion is established if the respondent has not proceeded in the manner required by law,...

California Code of Civil Procedure §1094.5

Burden of proof; conformance to conditions in §65589.5

In any action taken to challenge the validity of a decision by a city, county, or city and county to disapprove a project or approve a project upon the condition that it be developed at a lower density pursuant to §65589.5, the city, county, or city and county shall bear the burden of proof that its decision has conformed to all of the conditions specified in §65589.5.

Government Code §65589.6

Proposal of local agency to disapprove project or approve project on condition of

lower density; written findings; existence of conditions

When a proposed housing development project complies with the applicable general plan, zoning, and development policies in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

(a) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density.

(b) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to subdivision (a), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

Government Code §65589.5

Ordinances limiting building permits or development of buildable lots for residential purposes; impact on supply of residential units; actions challenging validity

(a) Any ordinance enacted by the governing body of a city, county, or city and county which

directly limits, by number (1) the building permits that may be issued for residential construction or (2) the buildable lots which may be developed for residential purposes, is presumed to have an impact on the supply of residential units available in an area which includes territory outside the jurisdiction of such city, county or city and county.

(b) With respect to any action which challenges the validity of such an ordinance, the city, county, or city and county enacting such ordinance shall bear the burden of proof that such ordinance is necessary for the protection of the public health, safety, or welfare of the population of such city, county, or city and county.

Evidence Code §669.5

Legislative findings and declaration

The legislature finds and declares that there is a statewide need to ensure clear understanding of the specific requirements which must be met in connection with the approval of development projects and to expedite decisions on such projects. Consequently, the provisions of this chapter shall be applicable to all public agencies, including charter cities.

Government Code §65921

Acceptance of application as complete; requests for additional information; restrictions; claratification, amplification, correction, etc.; prior notice of necessary information

(a) After a public agency accepts an application

as complete, the agency shall not subsequently request of an applicant any new or additional information which was not specified in the list prepared pursuant to §65940...

Government Code 65944

Uniformity of zoning regulations

All such regulations shall be uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones.

Government Code §65852

Judgment on Demurrer

Whether and how far a judgment entered on the sustaining of a demurrer is res judicata depends on the character of the demurrer sustained. A judgment sustaining a general demurrer operates as res judicata and a bar to a second action on the same cause of action or claim, provided the circumstances of the first case were such as to make the judgment one on the merits. A judgment entered after the sustaining of a general demurrer on substantive grounds is on the merits and concludes a subsequent action.....A judgment sustaining a general demurrer may not, however, be a judgment on the merits and may not, therefore, be a bar to a second caue of action where the defects are technical or formal, and the plaintiff may, by a different pleading, eliminate them or correct the omissions and allege facts constituting a good cause of action. This result has frequently been reached where the failure of

the first complaint was in misconceiving the remedy, or in framing the complaint on the wrong form of action. Thus, if new or additional facts are alleged in a second action to cure defects in the original pleading, the former judgment on a general demurrer is not a bar to the subsequent action, whether or not the plaintiff had an opportunity to amend his complaint.

40 Cal Jr 3d. Judgments § 244. pps. 667-668

Congress shall make no law...prohibiting...the right of the people...to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I

...nor shall private property be taken for public use, without just compensation.

U.S. CONST. AMEND. V

...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV Sec. 1

STATEMENT OF THE CASE

In 1983 Appellant contracted to purchase 120 acres of real property in the City of Martinez. The single parcel contained 160 acres. A portion of the agreement was that Appellant would subdivide 40 acres for return to the seller. Appellant applied to the City of Martinez for a building permit. Appellant was told he would have to go through the Martinez Planning Commission in order to obtain a building permit on his 160 acre parcel of property. Appellant complied, and the Martinez Planning Commission rejected Appellant's request. Appellant began a State logging operation on his 120 acres. The City of Martinez sent the police department out to Appellant's property and threatened to arrest Appellant if the logging operation was not ceased. At the time of this incident, Appellant had complied with all state requirements regarding logging, and possessed the proper licenses and permits. The City was so told at that time, but refused to change their position. A writ was filed to restrain the City's illegal actions. The City

attorney at that time, met with Appellant and an agreement was reached where Appellant would stop the logging operation and would be allowed to build a single family dwelling.

Appellant graded the lot for the home, installed the foundation, and was then informed that he would have to sign a scenic easement before he would be issued a building permit. Appellant signed under protest, and filed suit against the City of Martinez.

After moving into the new home, Appellant filed for a lot split separating the 120 acres from the 40 acres, as pursuant to the agreement with the seller. The City refused the request. Appellant modified his request, asking for a 35 acre lot split. The City again refused. The City had contracted with a new attorney to represent the City.

The following year, Appellant filed suit against the County Tax Assessor because the property was being assessed for R-7 residential zoning. The City of Martinez had incorrectly recorded the scenic easement extracted from the Appellant.

The Courts summarily dismissed all three actions, the logging suit, the suit against the City of Martinez and the suit against the County. A compromise was reached with the County Assessors Office concerning the taxes on the property.

Appellant was forced to pay an additional sum to the seller for the 40 acres because he was unable to subdivide the property.

Appellant then prepared and submitted a request for a subdivision on a portion of the 40 additional acres that Appellant was forced to purchase. The City Planning Department rejected Appellant's request, although Appellant's request conformed to the slope denisty ordiance of the City of Martinez. A compromise was reached with the Planning Department for them to support a five, one acre lots subdivision. The Martinez Planning Commission refused to grant approval for the five lot subdivision. Rather than to reject the proposal out of hand, they made a condition that Appellant must provide soils and hydrology studies prior to the City considering the

subdivision request. Appellant attempted to remove the requirement from consideration according to California law. The City refused and a lawsuit was filed. The Courts dismissed the action stating that the City had not made a final ruling on the subdivision request.

In each and every instance where the Planning Commission denied approval of Appellant's request, Appellant appealed the action to the City Council.

The City put the five lot subdivision issue back on the calendar and denied the request on the grounds that Appellant had not supplied the required studies. This action was also appealed to the City Council, and after the City refused to overturn the actions of the Planning Commission, a lawsuit was again filed. The City refused to prepare a record of the subdivision request, then tried to get the action dismissed because the Court had not been supplied with a record.

The Courts did summarily dismissed three fourths of the action. The Court then refused Appellant a trial on the issues. The single issue of the City

Council's denial of the five lot subdivision request was the only question that was allowed in a court hearing. The Court's again denied Appellant's request. The matter was again appealed to the State Appellate and Supreme Court. Both Courts denied Appellant's request, upholding the actions of the City of Martinez.

ARGUMENT

This case started when the City of Martinez refused to allow Appellant to build one single family dwelling on a 160 acre piece of property that was zoned R-7. R-7 zoning permits approximately five houses per acre. When Appellant complained to the City about the City's position, Appellant was told by the Planning Director that the City can do anything they want to do. During Appellant's attempt to construct a single family dwelling, the City extracted an open space and scenic easement in violation of California Government Code 65909. The City then refused to grant a lot split knowing full well that Appellant had agreed to obtain a lot split and return a portion of the property to the seller. The City made it clear from their actions and statements that it was their intention to bankrupt Appellant and would do whatever they could to accomplish this purpose.

The lawsuit over the extracted easement was summarily dismissed by the Superior Court, and not heard by the court (No.87-1744). During the

attempt of Appellant to accomplish his lot split, the City was busily working on a revised specific plan for the area. In the new specific plan the City removed all development sites from the Appellant's property with the exception of 4 remote home sites. The 4 designated remote home sites are clustered, 2 in one location and 2 in another location. Both locations designated for remote home sites would cost more to develop the two lots than the total value of the lots once they were developed. This action of the City of Martinez not only makes Appellant's land totally worthless, but actually a liability. The 5 one acre lot requests that Appellant reluctantly agreed to barely covers the cost of developing the 5 lots. The City Planning Commission was well aware of that fact when they made the conditions of hyrdrology and soils studies prior to them deciding on Appellant's subdivision requests. The Planning Commission also made it clear that they did not intend to approve more than the 2 lots regardless of what the studies said. The Planning Commission's actions are in direct violation with

California Government Code §65944. Appellant attempted to remove the required conditions in accordance with the California Government Code §65913.5, but the City refused and suit was filed. When hearing of the suit, the City Attorney stated he loved it, the Appellant was keeping the City attorney's wife in furs and the City's Attorney in a Mercedes. The Courts summarily dismissed the action.

In a slight twist of fate, Appellant attended a City Council meeting to hear his appeal on the Planning Commission's action. The item immediately prior to Appellant's City Council hearing, was an agenda item wherein the City Council was approving the adoption of Code of Civil Procedure §1094.6. Mr. Walter stated at the meeting to the City Council that adoption of the Code Section would limit the time in which a plaintiff could bring an action against the City to 90 days. This item was of particular interest to Appellant, in that the prior action had already been summarily dismissed on the grounds that it had not been timely filed. Without the City's

adoption of this particular code section, Appellant's prior action was in fact, timely filed. The City went on to deny Appellant's appeal, upholding the Planning Commission's decision. Members of the City Council stated that they did not intend to grant approval of more than two lots. A writ of mandamus action was filed against the City that challenged the City's general and specific plan concerning Appellant's property, the slope density ordinance, the prior action that Appellant had now learned had not actually been time barred, and the actions of the City Council in denying the 5 lot subdivision.

We now move from the City's handling of the case to the Courts handling of the case. I will not comment about prior lawsuits that have occurred in Appellant's attempt to utilize his property, even though they were set forth in the statement of the case. The case history was given in an attempt to demonstrate that Appellant has put forth an ongoing and a conserted effort to utilize his property in some manner. In each and every situation the City of Martinez has refused any and

all uses of Appellant's property, except wherein Appellant would agree to do things that would cost Appellant more money than he would recover from the development.

Judge Marchiano was the first to rule in this particular case. It was a ruling on a demurrer brought by the City of Martinez. Judge Marchiano threw out all of the causes of action dealing with administrative mandamus. This would include the challenge against the City slope denisty ordinance and their specific plan concerning Appellant's property. The actions of Judge Marchiano is in direct contradiction to California Code of Civil Procedure §1085, which allows the challenging of the City's ordinances under the mandamus process. In addition, Judge Marchiano threw out all of the causes of action that would relate to the prior lawsuit. This action was in direct contradiction to establish California Law as set forth in the 3rd Edition of Cal. Jur. Volume 30, under Judgments, §244.

The next major error in law was committed by Judge Patsey in his ruling against Appellant's

right to present evidence and testimony at a trial. This action was in direct contradiction to California C.C.P. §1094.5.

The next error of Judge Patsey is not only obvious, but is a direct affront to Appellant. Appellant presented, at the hearing on the 5 lot subdivision, two code sections that made the City responsible for the burden of proof in this action. These sections were Government Code §65589.6 and Evidence Code §669.5. Judge Patsey made a ruling that the Appellant had the burden of proof in this matter, in direct contradiction to both code sections. Despite the fact that Appellant raised these issues in addition to his constitutional issues at every phase of the proceedings, the Appellate Court and the State Supreme Court totally ignored California law in this matter. The State Courts never made a ruling on the U.S. Constitutional issues.

The Boston Tea Party was a protest against Government abuses. When America was established, the Courts were established so these abuses would never occur.

California Judges openly boast that they will always find some technecality to dismiss complaints of Pro Per litigants. The dismissals encountered by Appellant shows that they intend to do as promised, even if they have to ignore the law to accomplish their purpose.

The California Court System has abandoned their primary function, and does nothing but flounder, devouring itself on its own power trip while total decay overtakes the judicial system.

The truth is the City does not have enough money to make Appellant whole.

To date, the City of Martinez has proven that they can do anything they want to do as boasted in 1983. The City Attorney drives around in his Mercedes while his wife enjoys her furs.

Appellant, because of his misguided faith in the American Judicial System is bankrupt.

The only real question unanswered in this case "is how healthy is the U.S. Supreme Court"?

Respectfully submitted,

Melvin Phillips

MELVIN D. PHILLIPS

APPENDIX

Superior Court Order Sustaining Demurrer with Leave to Amend

Superior Court Order Granting Reespondents' and Real Parties in Interest's Motion to Strike

Superior Court Order of Court Re Live Testimony

Superior Court Tentative Decision

Superior Court Statement of Decision

Superior Court Judgment

Appellate Court Decision of Appellate Court

Petitioner's Petition for Alternative Writ of Mandate

Supreme Court of California Order Denying Review

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA
MELVIN D. PHILLIPS, Petitioner, vs. MARTINEZ · PLANNING DEPT., et al., Respondents.
CITY OF MARTINEZ, Real Party in Interest.
CASE NO. C88-02862

ORDER SUSTAINING DEMURRER WITH LEAVE TO AMEND

Respondents' and Real Party in Interest's Motion to Strike and Demurrer came regularly on for hearing on December 21, 1988, before the Honorable James J. Marchiano. Petitioner made no appearance. Jeffrey A. Waltter appeared on behalf of Respondents and Real Party In Interest.

Upon reading the papers submitted in support of and in opposition to said Motion and after hearing oral argument with respect thereto, and good cause appearing therefor:

IT IS HEREBY ORDERED that Respondents and Real Party In Interest's Motion to Strike is denied without prejudice for Respondents' and Real Party in Interest's failure to identify by page and line number those portions of the Petition which Respondents and Real Party in Interest desired to be stricken. Because the court is of the view that said Motion was meritorious the instant order denying said Motion is without prejudice to Respondents and Real Party in Interest's re-bringing said Motion.

IT IS FURTHER ORDERED that Real Party in Interest's and Respondents' Demurrer is Sustained, with leave being granted to Petitioner to amend his Petition, on the following grounds:

1. No administrative record has been filed in support of the Petition.

2. As to any and all claims for monetary damages alleged in the Petition, they are subject to demurrer because Petitioner has failed to allege compliance with the Government Tort Claim Act with respect to said claims of damages.

3. Any and all allegations pertaining to the

conduct of the City Attorney in Case No. 273655 are irrelevant, immaterial and provide no basis upon which any cause of action can be plead. In the event that Petitioner, in the amended Petition permitted hereunder, realleges any or all of said claims against the City Attorney, this Court will entertain a Motion to Strike same from such an amended Petition. In this connection, the Court will not countenance in this action relitigation of any or all of the issues resolved against Petitioner in said Case No. 273655.

IT IS FURTHER ORDERED that the Court has determined all of the claims asserted in Petitioner's Petition to be governed under California Code of Civil Procedure §1094.5.

IT IS FURTHER ORDERED that the Court determines that Government Code §65913.5 does not apply to the alleged conditions imposed by the City Planning Commission and City Council on Petitioner's subdivision application, namely, the requirement that Petitioner obtain soils and hydrology reports. Even assuming that Government Code §65913.5 did apply to said conditions, this

Court finds that Petitioner's posting of bonds, as alleged in his Petition, failed to comply with said Government Code section.

IT IS FURTHER ORDERED that Petitioner has 10 days from receiving notice of this Order to file and serve the amended petition permitted under this Order.

DATED: December 22, 1988, signed by James J. Marchiano, SUPERIOR COURT JUDGE

APPROVED AS TO FORM: MELVIN PHILLIPS

DATED: January 9, 1989

WALTER & PISTOLE, 2455 Bennett Valley Road, Suite 302B, Santa Rosa, CA 95404

(707) 523-0732

Attorneys for Respondents & Real Party in Interest

SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA

MELVIN D. PHILLIPS, Petitioner, vs. MARTINEZ PLANNING DEPT., et al., Respondents. CITY OF MARTINEZ, Real Party in Interest.

CASE NO. C88-02862

ORDER GRANTING RESPONDENTS'AND REAL PARTIES IN INTEREST'S MOTION TO STRIKE

Respondents and Real Party in Interest's Motion to Strike portions of the amended petition came on regularly for hearing on March 15, 1989, at 9:00 a.m. in Dept. 13, the Honorable Richard L. Patsey, presiding. After hearing oral argument and considering all of the papers submitted in favor of and in opposition to the motion, and good cause appearing therefor:

IT IS HEREBY ORDERED THAT Respondents and Real Party in Interest's Motion is granted in its entirety and the following allegations, paragraphs and portions of the amended petition are hereby stricken therefrom:

1. Page 1, lines 12 and 13: Strike "MARTINEZ PLANNING DEPARTMENT, MARTINEZ PLANNING COMMISSION and MARTINEZ CITY ATTORNEY."

2. Page 1, line 23: Strike: "traditional mandamus under CCP §1085 and".

3. Strike paragraphs 4, 5, 6, 11 and 12 in their entirety.

4. Page 1, line 28 through page 2, line 6 1-2: Strike "the city attorney is responsible for overseeing city boards, so that the Cities *[sic]* actions conform to Federal, State and local laws".

5. Page 7, lines 22 through 28: Strike paragraphs 2, 3 and 4 of the prayer in their entirety.

6. Page 8, lines 1-2: Strike paragraph 5 of the prayer in its entirety.

IT IS FURTHER ORDERED THAT Petitioner shall have 10 days from March 15, 1989, within which to amend his Petition in accordance with this Order.

IT IS FURTHER ORDERED THAT RESPONDENTS AND REAL PARTY IN INTEREST shall have 30 days from receipt of Petitioner's Seconded Amended Petition within which to answer or otherwise respond thereto.

IT IS SO ORDERED.

DATED 3/27/89, signed by RICHARD L. PATSEY, SUPERIOR COURT JUDGE

MELVIN D. PHILLIPS, Petitioner, vs. MARTINEZ

PLANNING DEPT., et al. Respondents. CITY OF MARTINEZ, Real Party in Interest.

Counsel:

MELVIN D. PHILLIPS, Plf. in Pro Per

(No Appearance)

WALTER & PISTOLE By: LEWIS N. UNGER for Respondents and Real Party in Interest (No Appearance)

Case No. C88-02862

ORDER OF COURT RE LIVE TESTIMONY

Having considered the briefs filed by parties, the Court rules that live testimony will not be permitted at the hearing to be held on January 2, 1990.

IT IS SO ORDERED.

Dated: December 26, 1989

RICHARD L. PATSEY, SUPERIOR COURT JUDGE

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA

MELVIN D. PHILLIPS, Petitioner vs. MARTINEZ

PLANNING DEPARTMENT, et al, Respondents. CITY OF MARTINEZ, Real Party in Interest.

Case No. C88-02862, TENTATIVE DECISION

In this action Petitioner seeks a writ of administrative mandamus against the City of Martinez and related orders.

Briefly stated, Petitioner, a landowner, sought a subdivision permit to develop certain real proprty in Martinez, California. Respondents have denied the subdivision permit without Petitioner first submitting soils and hydrology studies. The Palnning Commission of the City had recommended such studies because of instability of the soil in the area of Petitioner's property. The question before the Court is whether Petitioner has met his burden of showing an abuse of discretion. Having examined the entire administrative record, the Court finds no such abuse has been shown. Accordingly, the petition is denied. Judgment is entered for Respondents. Counsel for Respondent shall prepare a proposed Statement of Decision.

Dated: January 4, 1990, Richard L. Patsey,

Superior Court Judge.

WALTER & PISTOLE, a p.c.

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Santa Rosa, CA 95404

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Attorneys for Respondents & Real Party in Interest

SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA

MELVIN D. PHILLIPS, Petitioner,vs. MARTINEZ PLANNING DEPT., et al, Respondents.

CITY OF MARTINEZ, Real Party In Interest.

STATEMENT OF DECISION

Date: January 2, 1990 Time: 9:00 a.m. Dept: 13

The Court having reviewed the entire administrative record, all other matters and records on file in this case, and having heard oral argument by the parties, has determined that the Respondents have not committed an abuse of discretion, and that the petition for writ of mandate under Code of Civil Procedure §1094.5

should be denied.

Dated 1/18/90, RICHARD L. PATSEY, Superior Court Judge

APPROVED AS TO FORM (Local Rule 3.14)

Melvin D. Phillips

PROOF OF SERVICE BY MAIL,

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to the within above-entitled action; my business address is: 2455 Bennett Valley Road, Suite 302B, Santa Rosa, CA 95404.

On January 16, 1990, I served the attached: PROPOSED STATEMENT OF DECISION on the below named, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Santa Rosa, County of Sonoma, California, addressed as follows: Melvin Phillips, P.O. Box 1979, Martinez, CA 94553

I certify under penalty of perjury that the foregoing is true and correct. Executed on January 16, 1990, at Santa Rosa, California. Mari-Beth

Perkins

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF CONTRA COSTA

MELVIN D. PHILLIPS, Petitioner, vs. MARTINEZ PLANNING DEPARTMENT, et al., Respondents. CITY OF MARTINEZ, Real Party in Interest.

Case No. C88-02862 JUDGMENT

This action was heard by this Court on January 2, 1990.

JUDGMENT: The question before the Court is whether Petitioner has met his burden of showing an abuse of discretion. Having examined the entire administrative record, the Court finds no such abuse has been shown. Accordingly, the petition is denied. Judgment is entered for Respondents.

Dated: September 20, 1990, Richard L. Patsey, Superior Court Judge

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

MELVIN D. PHILLIPS, Plaintiff and Appellant, vs. CITY OF MARTINEZ, Defendant and Respondent. Case No. A048596, Contra Costa County Superior Court No. C88-02862 DECISION OF APPELLATE COURT (Not to be published in Official Reports)

Plaintiff/appellant Melvin D. Phillips appeals a judgment denying his petition for writ of administrative mandate (Code Civ. Proc., § 1094.5) to compel respondent City of Martinez to approve his subdivision application. We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant owns a 160-acre parcel in Martinez. In 1984 respondent approved his application to construct a residence on the property, subject to conveying to respondent an open space easement. Appellant conveyed the easement, but 11 months later brought an action against respondent seeking its cancellation. (Contra Costa Co. Sup. Ct. No. 273655.) We earlier affirmed the trial court's order sustaining respondent's demurrer without

leave to amend, holding that the causes of action challenging the lawfulness of the permit condition were barred both because his proper remedy was a writ of administrative mandate seeking invalidation of the condition at the time the condition was imposed, and he failed to meet Government Code section 65907, which establishes a 90-day limitation period for such challenges.[1] (See Phillips v. City of Martinez (Oct. 20, 1987) A036295 nonpub. opn.].)

In 1987 appellant submitted an application to subdivide five acres of the parcel into five single-family one-acre lots. An initial environmental study prepared for the Planning Commission prior to its mandatory public hearing on the application (Pub. Res. Code, § 21092) listed five separate permits that required approval £or the subdivision: A General Plan amendment (because the Specific Plan Land Use Map governing the area designates only two homesites on the five-acre site), a tentative subdivision map, a planned unit development (PUD), a major

[1] Unless otherwise indicated, all further statutory references are to the Gover

subdivision, and an exception to the subdivision ordinance limiting the length of cul-de-sacs. The study indicated that the project could have an impact on soil stability and drainage, and could result in, inter alia, possible land or mud slides. Pertinent to amendment of the General Plan, the report noted that a geological map from an environmental impact report (EIR) addendum done in conjunction with the Specific Plan ordinance identified landslide deposits in the area of a proposed private road. The study recommended that if the commission wished to approve the proposal, approval be granted contingent on demonstration of adequate soil stability. The study recommended approval of a negative declaration, PUD, tentative subdivision map and exception to the subdivision ordinance, contingent on city council approval of the General Plan amendment and subject to the report's recommended conditions. Approval of the PUD and tentative subdivision map were conditioned, inter alia, on review (at appellant's expense) and approval by respondent's soils

engineer/geological consultant of appellant's geotechnical and soils report and grading plan prior to recordation of the final map or approval of grading plans.

At the hearing neighbors of the proposed subdivision expressed concern with soil instability, water runoff from the project, and conflict with the Specific Plan. The Planning Commission continued its decision on the subdivision application until appellant provided a soils/hydrology study.

Appellant appealed the Planning Commission's decision to the city council, which upheld the requirement for additional studies and denied the appeal.

Four months later the planning director recommended that the Planning Commission deny the subdivision application due to appellant's unreasonable delay in providing the soils/hydrology study. Pursuant to former section 65913.5 (now § 66008), appellant filed a protest to the required soils/hydrology study and tendered a performance bond to "cover the full

cost of the protested conditions." The commission denied the subdivision application without prejudice on the grounds the requested soils/hydrology study had not been provided, nor was there any indication of progress thereon. The city council again upheld the Planning Commission's decision.

Appellant then petitioned for an alternative writ of mandate pursuant to Code of Civil Procedure sections 1085 and 1094.5. In addition to challenging respondent's denial of his subdivision application, appellant alleged a myriad of other grievances against respondent related to its restrictions on development of his property, including fraud by the city attorney in obtaining the judgment against him in case number 273655, abuse of discretion in limiting the number of lots pursuant to a local slope density ordinance, and entitlement to approval of his subdivision application due to compliance with former section 65913.5.

Respondent demurred to each cause of action on the grounds of failure to state facts sufficient to

constitute a cause of action, uncertainty, and failure to submit an administrative record. The court ruled that all claims asserted in the petition were governed by Code of Civil Procedure section 1094.5. and that appellant's alleged compliance with former section 65913.5 did not apply to the Planning Commission's soils/hydrology study requirement. It sustained the demurrer with leave to amend on the grounds: (l) No administrative record was filed in support of the petition; (2) the petition failed to allege compliance with the Tort Claims Act with respect to the claim for monetary damages; and (3) there was no basis on which a cause of action could be pled regarding respondent's attorney's conduct in case number 273655. The order warned that "[i]n the event [appellant] in the amended Petition permitted hereunder, realleges any or all of said claims against the City Attorney, this Court will entertain a Motion to Strike same from such an amended Petition. In this connection, the Court will not countenance in this action relitigation of any or all of the issues resolved against

Petitioner in said Case No. 273655." Appellant was given 10 days to file and serve "the amended petition permitted under this Order."

Appellant filed an amendment to his original petition adding four new paragraphs generally alleging he had complied with the Tort Claims Act and had requested an administrative record from respondent. Attached to the amendment was an administrative record compiled from his own files and copies of his claim against respondent and its rejection thereof. He did not otherwise amend or alter his petition.

Respondent then moved to strike all reference to Code of Civil Procedure section 1085 and all allegations concerning its attorney's responsibility to appellant, and to case number 273655. It also moved to strike the allegations concerning the slope density ordinance and entitlement to an 18-1Ot subdivision permit on the grounds they were unintelligible, uncertain, and irrelevant to appellant's challenge of the denial of a S-lot subdivision. The motion to strike was granted in its entirety, and appellant was

given 10 days to amend his petition accordingly. He did not do so. The trial court denied his request to present live testimony at trial. At trial he argued for the first time that: (I) His application was granted by operation of law due to the Planning Commission's failure to take action on it within the requisite time limitations of the Subdivision Map Act (§ 66410 et seq.); and (2) respondent violated other sections of the Subdivision Map Act and failed to bear its burden of proving compliance therewith. Respondent objected to the new arguments as untimely, but the court did not rule on the objection. In its statement of decision the court stated it had reviewed the entire administrative record and all other matters on file, determined respondent did not abuse its discretion, and denied the petition.

DISCUSSION

Appellant's brief on appeal is as scatter-shot as his writ petition to the trial court. His claims of error may be described, generously, as opaque, but they are sufficiently discernable to fall generally into two groups: (I) Pretrial errors in the rulings

on the demurrer and motion to strike; and (2) errors at trial and in the final judgment. For simplicity's sake, they are discussed seriatim.

I

A.

Appellant contends the court erred in sustaining respondent's demurrer for lack of an administrative record and failure to allege compliance with the Tort Claims Act. Insofar as he was allowed to amend his petition in conjunction with these grounds and did so, attaching an administrative record and his claim and respondent's rejection thereof, he was not aggrieved by the ruling and cannot now complain about it. (See 9 Witkin, Cal. Procedure (3d ed. 1985) § 142.)

B.

Appellant next contends the trial court erroneously ruled that his petition is governed solely by Code of Civil Procedure section 1094.5 and that former section 65913.5 is inapplicable to his claims. In passing upon the sufficiency of a pleading, its allegations must be liberally

construed. Although allegations of the complaint are deemed true, if they are contrary to law or to a fact of which a court may take judicial notice, they are to be treated as a nullity. (See Dale v. City of Mountain View (1976) 55 Cal.App.3d 101, 105.) When a demurrer is sustained the court may grant leave to amend the pleading upon any terms as may be just. (Code Civ. Proc., § 472a, subd. (c).) The court does not abuse is discretion sustaining a demurrer where the facts are not in dispute and the nature of the claim is clear, but no liability exists under substantive law. (Lawrence v. Bank of America (1985) 163 Cal.App.3d 431, 436-437.) On appeal we determine whether the complaint states facts sufficient to constitute a cause of action. (Blank v. Kirwan (1985) 39 Cal.3d 311, 318.)

Appellant contends that his petition is governed by Code of Civil Procedure section 1085, as well as Code of Civil Procedure section 1094.5. California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.) requires a public agency to determine whether a proposed

subdivision, based on the facts peculiar to it, may have a significant adverse effect on the environment (Pub. Res. Code, §§ 21068, 21080, subd. (a)) before it approves the project. Therefore, subdivision approvals are adjudicatory in nature and are reviewed pursuant to Code of Civil Procedure section 1094.5. (Horn v. County of Ventura (1979) 24 Cal.3d 605, 614.) "Traditional" mandamus (Code Civ. Proc., § 1085) is used to compel performance purely ministerial in character. It cannot be used to control discretion on a matter lawfully entrusted to an administrative agency. (State of California v. Superior Court (1974) 12 Cal.3d 237, 247.) Because appellant was challenging adjudicative rulings concerning subdivision permits, Code of Civil Procedure section 1085 is inapplicable. Appellant argues that his alleged compliance with former section 65913.5 constitutes a proper claim for relief. This statute has not changed substantially since being renumbered as section 66008. It allows a party to protest the imposition of fees or other actions imposed as a condition of

a public agency's approval of a development project by tendering any required payment in full, or providing satisfactory evidence of arrangements to ensure performance of the conditions necessary to meet the requirements of the imposition. Subdivision (b) of section 66008 specifically provides that it "does not limit the ability of a local agency to ensure compliance with all applicable provisions of law in determining whether or not to approve or disapprove a development project."

Here, respondent required the soils/hydrology study to assist it in determining whether the subdivision complied with CEQA. Submission of the study was not a condition precedent to approval of the subdivision, but was required to determine whether the proposed subdivision complied with CEQA. Consequently, compliance with former section 65913.5 was irrelevant to the purpose of the requested study.

C.

Appellant contends all allegations stemming from case number 273655 were erroneously stricken

from his petition. A court may in its discretion strike out any irrelevant, false or improper matter from a pleading based upon matter on the face of the pleading or that of which it may take judicial notice. (Code Civ. Proc., §§ 436, 437.) In essence, the stricken paragraphs allege that respondent's attorney misrepresented certain matters to the trial court in case number 273655. However, in light of our earlier decision that case number 273655 was barred because appellant failed to comply with the statute of limitations of section 65907, the stricken allegations are irrelevant.

II

A.

Appellant contends the court erred in refusing to let him present live testimony at trial. In a proceeding under Code of Civil Procedure section 1094.5, the court relies solely on the administrative record unless it finds there is relevant evidence which could not have been produced at the administrative hearing in the exercise of reasonable diligence, or was

improperly excluded. (Code Civ. Proc., § 1094.5, subd. (e); No Oil Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 79, fn. 6.) The record before us discloses no effort by appellant to demonstrate that the testimony he wished to present could not have been or was excluded from the administrative hearing. There was no offer of proof. (See 3 Witkin, Cal. Evidence (3d ed. 1986) §S 2041, 2042.) The court did not err in limiting its review to the administrative record.

B.

Relying on sections 66452.1, subdivision (b) and 66452.4, appellant contends, in essence, that respondent was without jurisdiction to deny his subdivision application because it was approved by operation of law due to the five-month gap between the Planning Commission's October decision tabling determination of his proposed subdivision pending further soils/hydrology study, and its formal denial of the application in March. Section 66452.1 requires the agency authorized to approve subdivision tentative maps to approve, conditionally approve, or deny a tentative map

"within 50 days after the filing [of the tentative map] with its clerk and report its action to the subdivider." Section 66452.4 provides that if no action is taken on a tentative map by the agency within the time limits of section 66452.1, or any authorized extension thereof, the tentative map as filed shall be deemed approved, insofar as it complies with the applicable requirements of the Subdivision Map Act and local ordinances, and "it shall be the duty of the clerk of the legislative body to certify or state his or her approval." The Subdivision Map Act does not define "filing" for purposes of sections 66452.1 and 66452.4. However, even if we assume, as appellant urges, that the "filing" date is the date a tentative map is presented to the Planning Commission at a public hearing (see, e.g., Carmel Valley View, Ltd. v. Maggini (1979) 91 Cal.App.3d 318, 320), the fact that formal denial of appellant's subdivision application was more than 50 days after that hearing does not here result in approval of the subdivision as a matter of law. First, sections 66452.1 and 66452.4 pertain only to tentative

maps. As appellant's own subdivision application demonstrates, approval of a subdivision depends on more than approval of the tentative map alone; there are a variety of other permit approvals involved, e.g., amendments to the general plan, PUD requirements, and variances. Second, the Subdivision Map Act forbids approval of a tentative map unless it is consistent with the General or Specific Plan adopted by the public agency. (§66473.5.) Appellant's tentative map proposing five residential lots conflicts with respondent's Specific Plan limiting the number of homesites in the area to two. Third, a planning commission may obtain a routine waiver of the Subdivision Map Act time limitations for the purpose of permitting an environmental review on the project. (§ 66451.1.) Appellant agreed, when making his subdivision application, to processing times in excess of those specified in the Subdivision Map Act "as necessary for EIR processing." As discussed, infra, the Planning Commission's soils/hydrology study requirement was pertinent to its obligation to determine

whether an EIR was necessary for the project.

C.

Appellant contends there was insufficient evidence to support the denial of his subdivision application. In reviewing an administrative agency decision the trial court determines whether there was a prejudicial abuse of discretion by the agency, which occurs if its order was not supported by the findings, or the findings were not supported by the evidence. (Code Civ. Proc., §1094.5, subd. (b).) The trial court exercises its independent judgment if the administrative decision affects a fundamental vested right. It applies the substantial evidence test to all other agency decisions. (Bixby v. Pierno (1971) 4 Cal.3d 130, 143; Code Civ. Proc., §1094.5, subd. (c).) In either case, the appellate court applies the substantial evidence test and overturns factual findings only if the evidence is insufficient to sustain them as a matter of law. (Barrie v. California Coastal Com. (1987) 196 Cal.App.3d 8, 14.)

A fundamental vested right is one that is already

possessed or legitimately acquired. Landowners have no vested right in any particular use of their property unless the use restriction constitutes an uncompensated taking or damaging of the property. (Davis v. California Coastal Zone Conservation Com. (1976) 57 Cal.App.3d 700, 707-708.) Because development permits are interim measures to assure that the development conforms with applicable statutes, denial of a permit does not constitute a taking. Consequently, the trial court employs the substantial evidence test in reviewing administrative findings stemming from permit applications. (Ibid; see also Smith v. County of Los Angeles (1989) 211 Cal.App.3d 188, 199, fn. 6.)

Under CEQA, the agency responsible for approving a project (here, the Planning Commission), must prepare either an EIR or a negative declaration before approving the project. (Pub. Res. Code, §S 21151, 21064; Cal. Code Regs., tit. 14, § 15063.) It makes the determination of which document to prepare on the basis of a formal environmental evaluation, or initial study, of the project. If the

project is to be carried out by a private party, the commission may require the party to submit data and information for the initial study. (Cal. Code Regs., tit. 14, §S 15060, subd. (a), 15063.) The agency may disapprove a project application for unreasonable delay by the private party in meeting requests for information necessary for the agency's preparation of the initial study. (Cal. Code Regs., tit. 14, § 15109.)

There was ample evidence before the Planning Commission to warrant concern about land and mudslides resulting from construction in the vicinity of the proposed subdivision, thereby justifying a request for additional study of hydrology and soil stability before approving appellant's application. Because appellant did not cooperate with this request in a timely fashion, respondent did not abuse its discretion in denying the application.

Appellant contends that because his proposed project complied with the existing slope density ordinance, the Planning Commission's refusal to approve the number of houses permitted by the

ordinance violated sections 65589.5 and 65589.6. These sections state that when a local agency denies a housing development that conforms to applicable zoning ordinances it shall have the burden of proving, in written findings, that approval of the number of houses permitted by ordinance would have an adverse impact on public health or safety and there is no feasible method to mitigate or avoid the adverse impact. Nothing in the administrative record demonstrates that appellant appealed tho Planning Commission's decision to restrict the number of houses in the subdivision to the city council, as required by Martinez ordinance 21.42.100. Without first exhausting his administrative remedies, he may not seek relief from this decision in the trial court. (Mountain View Chamber of Commerce v. City of Mountain View (197a) 77 Cal .App . 3d 82, 88.)

Appellant contends that respondents' requirement of a soils/hydrology study violates section 65944, which states that after a public agency accepts an application for a development project

as complete, it shall not subsequently request from the applicant any new or additional information not specified in the list prepared pursuant to section 65940. The record does not support this contention. Section 65940, as in effect at the time of appellant's application, provided that each local agency shall compile one or more lists specifying in detail the information which will be required from any applicant for any development project and to make such information available to the applicant. The environmental information form appellant signed when he began the subdivision permit application process states that he shall include information concerning topography and soil stability in a description of the project site. He was also provided the Planning Commission's list of information required on a tentative map, which includes "[p]rovisions for drainage and flood control."

Relying on Evidence Code section 669.5, appellant, for the first time on appeal, contends respondent failed to meet its burden of demonstrating the

validity of the Specific Plan governing the proposed area of development, which limits homesites to two. Evidence Code section 669.5 requires a city, in any action challenging an ordinance directly limiting the number of buildable lots which may be developed for residential purposes, to bear the burden of proof that the ordinance is necessary for the protection of the public health, safety, or welfare of the city's population. because appellant did not challenge the issue of the Specific Plan's validity at trial, he may not raise it now. (Estate of westerman (1968) 68 Cal.2d 267, 279.)

Affirmed.

We concur:

HANING, J.

LOW, P. J.

KING, J.

MELVIN D. PHILLIPS, P.O. Box 1979 Martinez, CA 94553 (415) 372-3394 Petitioner in Propria Persona

SUPERIOR COURT OF CALIFORNIA, COUNTY OF CONTRA COSTA

MELVIN D. PHILLIPS, Petitioner, vs . MARTINEZ PLANNING DEPT., MARTINEZ PLANNING COMMISSION, MARTINEZ CITY ATTORNEY AND MARTINEZ CITY COUNCIL, Respondents, CITY OF MARTINEZ, Real Party in Interest.

Case No. C88-02862 PETITION FOR ALTERNATIVE WRIT OF MANDATE

1. Melvin Phillips is the petitioner in this action. Petitioner has an ownership interest in approximately 160 acres of land in the City of Martinez. The petitioner's land and its uses are the subject of this writ. Petitioners property is within the city limits of the City of Martinez. Petitioner alleges traditional mandamus under CCP §1085 and administrative mandamus under CCP §1094.5 as a result of the actions of the respondents as hereinafter alleged.

2. Respondents and their individual members are responsible for the administration of land use, within the city limits of Martinez. The city attorney is responsible for overseeing city boards, so that the cities actions conform to Federal, State and local laws. All respondents are

employees, agents or contractors of the City of Martinez.

3. The City of Martinez is the real party in interest because the City of Martinez will be responsible for damages to the petitioner as a result of the actions of the cities employees, agents or contractors.

4. On May 4, 1987, petitioner made an application to subdivide a portion of petitioners Martinez property. Petitioner was informed that the application would have to conform to the cities slope density ordinance. Petitioner conformed to the request, then appealed the issue of the slope density ordinance to the Martinez Planning Commission. The Planning Commission denied the appeal. The petitioner then appealed the commission's denial to the Martinez City Council. The City Council denied the appeal. The Martinez City Council made a final decision on the petitioner's sub-division proposal on April 20, 1988. Petitioner alleges that the slope density ordinance makes portions of petitioner's property totally useless and completely without value.

5. The existing zoning of petitioner's property entitled the petitioner to eighteen lots. The eighteen lots were computed, taking into consideration the slope density ordinance. Petitioner submitted an application for eighteen lots to the Martinez Planning Department. The Planning Department refused to approve the sub-division request of petitioner. Petitioner appealed the Planning Department's decision to the Planning Commission. The Planning Commission denied petitioner's appeal. Petitioner then appealed the issue to the Martinez City Council. The City Council denied the appeal. Petitioner alleges that the failure to approve the petitioner's eighteen lot sub-division request was arbitrary. The Planning Department had a duty to approve petitioner's sub-division request. The actions by the Planning Department abused its discretion by withholding approval of a sub-division request that conformed to State and local laws.

6. The Martinez Planning Department approved five, one acre lots, as a result of petitioner's sub-

division application. On October 13, 1987 the Martinez Planning Commission decided that the petitioner would have to obtain a soils and hydrology report, before the commission would consider the sub-division request. Petitioner alleges that the conditions were for the sole purpose of harrassing and annoying petitioner. None of the planning commissioners voting for the reports possessed the expertese to analyze the requested reports. In addition, the evidence submitted at the hearing did not support any need for the requested reports. The petitioner appealed the Planning Commission's decision to the Martinez City Council. The City Council denied the appeal.

7. On March 11, 1988, the petitioner's sub-division request was again, put before the Martinez Planning Commission. Petitioner protested the study requirements and tendered performance of a bond, to eliminate from consideration the condition for the requested reports. Each of the planning commissioners received a copy of the protest and bond tender

prior to the consideration of petitioner's sub-division request. The protest and tender was made pursuant to Government Code §65913.5.

The Planning Commission was bound by the law to disregard the request reports in making a final decision on petitioner's sub-division application. Despite the fact that the reports were removed from consideration, the Planning Commission denied petitioner's sub-division application in that the evidence did not support the decision of the Planning Commission. The original action of the Planning Commission was to delay petitioner, as the Commission had no intention of approving petitioner's sub-division application. The acts of the Commission are not in comformity with State laws, and abused whatever discretion the Commission is granted by law.

8. Petitioner has a clear, present, and substantial right to the performance of respondent's duty in that respondents have an obligation to perform their duties in conformity with State and Federal laws. In addition respondents have a duty to make quasi-judicial decisions according to the evidence

on record and submitted at the hearings. The respondents actions, as herein alleged, had no relationship to the public health, safety, morals or general welfare.

9. Petitioner is a person beneficially interested in the issuance of a writ by virtue of the fact that petitioner is one of the owners of the property involved. Petitioner has been severely damaged financially as a result of the respondents illegal activities alleged herein.

10. Petitioner has performed all conditions precedent to the filing of this petition by appealing all of the decisions alleged herein, to the Martinez City Council. In addition the Martinez City Council has made a final decision on the sub-division application of the petitioner. Petitioner has by his actions exhausted all administrative remedies with the City of Martinez. In addition, petitioner has in each instance alleged herein, made a demand on the respondents to fulfill their proper duties. In each and every instance the demand of the petitioner was ignored by respondents. At all times herein

mentioned, respondents have been able to perform the duty mentioned or exercise the discretion mentioned herein. Not withstanding such ability, and despite petitioner's demand for the performance of the duty and the exercise of such discretion, respondents have refused petitioner's request.

11. On June 28, 1985, Petitioner filed a complaint against the City of Martinez. On December 20, 1985, Jeffrey Walter, as City of Martinez attorney, signed a Supplemental Memorandum of Points and Authorities. Mr. Walters then filed said document in the suit, case number 273655. In the document, Mr. Walters represents that the complaint should have been a mandamus action and that the action was time barred because it had not been filed within 90 days. On March 24, 1986, Judge Dolgin ruled that the action should have been a mandamus action and that the action was time barred. Code of Civil Procedure s 1094.6 does limit the filing time of a writ to 90 days, but only if the public agency has adopted the code provision. The City of Martinez

did not adopt the code provision until April 20, 1988. At the time the order was made dismissing petitioner's action, the action was in fact not time barred.

12. Petitioner was unaware of the false statements made by Mr. Walters. Petitioner had no way to ascertain the true facts. Petitioner had previously requested a complete copy of the City ordinances, but was told by the City Clerk that a copy was not available. Petitioner was told to inquire at the separate departments and the individuals would inform petitioner what ordinances were applicable. Petitioner alleges that the fraudulent representations of Mr. Walters, and their subsequent concealment stays the statute of limitations in action No. 273655 until April 20, 1988. Petitioner alleges that action No. 273655 should be converted to a mandamus action and joined with this action.

13. In each planning decision alleged herein, petitioner appealed each decision to the City Council of Martinez. In each and every appeal, the City Council denied petitioner's appeal. Said

denials of the appeals by the City Council was an abuse of discretion on the part of the Council. Petitioner had a legal right to the requested sub-divisions. None of the denials were supported by the facts. The City Council had a duty to perform its quasi-judicial decisions according to the applicable Federal, State and local laws.

14. Petitioner filed a sub-division application with the Martinez Planning department on May 4, 1987. The Planning Department refused to approve the plan. The Planning Department approved plan of five lots was put before the Planning Commission on October 13, 1987. The Planning Commission imposed the report conditions on that date. All of the decisions of the Planning Department and the Planning Commission were appealed to the City Council on November 13, 1987. The City Council denied the appeal on November 18, 1987. On March 22, 1988, after the petitioner removed the soils and hydrology reports from consideration, the Planning Commission denied petitioner's sub-division application. Petitioner appealed the Planning

Commission's decision to the City Council. On April 20, 1988, the City Council denied the appeal. On April 22, 1988, petitioner made a last formal written demand on the City of Martinez. The City Council rejected the demand on May 5, 1988. A request for a record was made on 3/25/88.

15. Petitioner has been damaged by the acts of the respondents. and alleges that petitioner should be compensated for his damages under the Code of Civil Procedure §1095.

16. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition. The conditions imposed were done under planning and zoning regulations of the State and the City of Martinez.

WHEREFORE, petitioner prays:

1. That the court issue an alternative writ of mandate;

2. That the court declare the City of Martinez slope density ordinance null and void and that the City of Martinez be required to grant a 24 lot sub-division to petitioner;

3. That the City of Martinez be required to grant

an 18 lot sub-division to petitioner;

4. That the City of Martinez be required to grant a 5 lot sub-division to petitioner;

5. That the City of Martinez be required to cancel the scenic easement on 120 acres of petitioner's property;

6. That the City of Martinez be required to pay damages to Petitioner as proved at trial;

7. That the City of Martinez be required to pay petitioner the cost of this action.

8. For such other and further relief as the court deems just and proper.

Signed July 14, 1988 by MELVIN D. PHILLIPS, petitioner in pro per.

VERIFICATION

I, MELVIN D. PHILLIPS, am the petitioner in this proceeding. I have read the foregoing petition and know the contents thereof. The same is true of my own knowledge, and can testify to the facts alleged in the petition.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on July 14, 1988, at

Martinez, California by MELVIN D. PHILLIPS.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, First Appellate District, Division Five, No. A048596, MELVIN D. PHILLIPS, Appellant vs. CITY OF MARTINEZ, Respondent ORDER DENYING REVIEW AFTER JUDGMENT BY THE COURT OF APPEAL.

Appellant's petition for review DENIED.

signed by Chief Justice Lucas.